
Supreme Court Creates New "Reasonable Employee" Standard, Expands Worker Protection from Retaliation under Title VII

2006-07-12

The United States Supreme Court recently adopted a less restrictive standard for what constitutes employer retaliation under federal law, thereby making it easier for employees to maintain claims of retaliation. In *Burlington N. & Santa Fe Ry. Co. v. White*, No. 05-259, 548 U.S. ____, 2006 WL 1698953 (U.S. Jun. 22, 2006), the Court resolved a circuit split concerning how harmful an adverse action against an employee must be in order to constitute a violation of Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on retaliating against those who complain of discrimination.

In addition to its substantive anti-discrimination provision, Title VII forbids an employer from discriminating against an employee (or job applicant) because that person has opposed any practice made unlawful by Title VII—or made a charge, testified, assisted or participated in a Title VII investigation or similar proceeding. In *Burlington N. & Santa Fe Ry. Co.*, the Court examined the scope of the phrase "discriminating against," as it applied to the reassignment and temporary suspension of Sheila White.

Ms. White, the only woman in her department, operated the forklift at Burlington's Tennessee rail yard until she complained that she had been sexually harassed by her immediate supervisor. The supervisor was disciplined and White was reassigned to a standard track laborer job. White was later suspended for 37 days without pay for insubordination after further conflict with a supervisor and after she had filed a retaliation complaint with the Equal Opportunity Employment Commission (EEOC) because of the reassignment. The railroad eventually cleared White of the charge and reinstated her with back pay, at which point White filed another retaliation complaint with the EEOC, claiming that the suspension also was retaliatory.

The Sixth Circuit Court of Appeals held that White's reassignment and the 37-day suspension without pay were both adverse employment actions constituting retaliation because each was a "materially adverse change in the terms and conditions of employment." The Supreme Court unanimously agreed, albeit under a slightly different rationale.

First, the Supreme Court held that Title VII's anti-retaliation provision was not limited to acts or harms affecting the terms and conditions of employment, but can be read more broadly. The Court differentiated the statute's anti-discrimination provision from its retaliation provision, which is

broadier in scope and is intended to deter any action (whether or not directly work-related) that may interfere with an employee's efforts to enforce his or her rights under Title VII.

Second, the Court determined how harmful an action had to be in order to constitute retaliation. Resolving a split among the Courts of Appeal, the Supreme Court adopted the Seventh and District of Columbia Circuits' formulation, and held that a plaintiff must show that the employer's challenged action might have been "material to a reasonable employee," meaning that "it would likely have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Injecting a **materiality** element into the analysis, the Court found, will sufficiently immunize employers from retaliation claims based on "those petty slights or minor annoyances that often take place at work and that all employees experience." Moreover, requiring that the action be material to a **reasonable** employee will provide an objective standard by which judges may evaluate retaliation claims.

Although seemingly creating an objective standard, the Supreme Court also recognized that "context matters," and that the particular circumstances of the case will need to be examined when determining whether an action is material. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children," the Court noted. Likewise, a supervisor's refusal to invite an employee to lunch may normally be trivial, while excluding an employee from a weekly training lunch may not be.

Under this new standard, the Court found that the reassignment and the 37-day suspension without pay were sufficiently materially adverse to constituting retaliation. Acknowledging that not all reassignments are automatically actionable, the Court said that in this particular case, a jury could find that the reassignment was materially adverse where the track laborer position was more arduous and dirtier, and the forklift position was more prestigious and considered a better job by the employees. Moreover, the Court noted that White had been suspended indefinitely and had to live for 37 days without income, stating that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship."

The decision will have the most impact in the Fifth and Eighth Circuits, which had previously held that only "ultimate employment decisions," such as failure to promote or firing, could form the basis for liability for retaliation. Regardless of an employer's location, the number of retaliation claims will continue to rise, as it is often easier for an employee to establish retaliation than any underlying discrimination. Accordingly, it is imperative that supervisors are trained on what actions constitute retaliation, on how to effectively communicate with and manage employees, and on proper documentation. It is critical to document performance issues before and after an employee engages in protected activity so that adverse actions can be justified.

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